STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY McNEIL and KIMBERLY McNEIL, Individually and as Next Friends of AMANDA McNEIL and TIFFANY McNEIL, Minors, and KIMBERLY McNEIL, Personal Representative of the Estate of ANDREW McNEIL, Deceased,

Plaintiffs-Appellants,

v

ANDREW METINKO and K. MURASZKO,

Defendants-Appellees.

UNPUBLISHED
March 13, 1998

No. 194595
Court of Claims
LC No. 94-001032-NH

ANTHONY McNEIL and KIMBERLY McNEIL, Individually and as Next Friends of AMANDA McNEIL and TIFFANY McNEIL, Minors, and KIMBERLY McNEIL, Personal Representative of the Estate of ANDREW McNEIL, Deceased,

Plaintiffs-Appellants,

v

UNIVERSITY OF MICHIGAN BOARD OF REGENTS doing business as UNIVERSITY OF MICHIGAN MOTT CHILDREN'S HOSPITAL,

Defendants-Appellees.

No. 194596
Court of Claims
LC No. 94-015272-CM

Before: Michael J. Kelly, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

In these consolidated appeals, plaintiffs appeal as of right from orders granting defendants' motions for summary disposition. We affirm.

This case stems from a report and accusations of child abuse leveled at plaintiffs Anthony and Kimberly McNeil by staff at the University of Michigan Mott Children's Center. The suspected abuse was of the McNeils' three and one-half-month-old son, Andrew, who apparently suffered and subsequently died of a brain injury that was later discovered to have occurred before or at birth. Plaintiffs alleged that defendants did not exercise good faith or reasonable care in reporting suspected child abuse and that they negligently inflicted mental distress on plaintiff through their accusations and comments.

The trial court granted defendants' motions for summary disposition on the reporting claim pursuant to MCR 2.116(C)(7), "immunity granted by law." Plaintiffs contend that the trial court's ruling was improper because defendants made a bad faith reporting of child abuse under the child protection law, MCL 722.621 et seq; MSA 25. 248(1) et seq. We do not agree.

MCR 2.117(C)(7) provides that summary disposition should be granted when "[t]he claim is barred because of . . . immunity granted by law." The court must look to the pleadings, affidavits, or other documentary evidence to determine whether there is a genuine issue of material fact. *Huron Tool & Engineering Co v Precision Consulting Services, Inc,* 209 Mich App 365, 376-377; 532 NW2d 541 (1995). Immunity granted by law is an affirmative defense, but "[t]he plaintiff must allege facts justifying application of an exception to . . . immunity in order to survive a motion for summary disposition." *Tyrc v Michigan Veterans' Facility,* 451 Mich 129, 134; 545 NW2d 642 (1996).

The child protection law provides:

> A physician . . . who has reasonable cause to suspect child abuse or neglect shall make immediately, by telephone or otherwise, an oral report, or cause an oral report to be made, of the suspected child abuse or neglect to the [Department of Social Services ("DSS"). [MCL 722.623(1); MSA 25.248(3).]
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> A person acting in good faith who makes a report, cooperates in an investigation, or assists in any other requirement of this act is immune from civil or criminal liability that might otherwise be incurred by that action. A person making a report or assisting in any other requirement of this act is presumed to have acted in good faith. [MCL 722.625; MSA 25.248(5).]

This Court has held that "[r]eading the sections together, it is apparent a person who has 'reasonable cause to suspect child abuse' is by definition 'acting in good faith' when reporting the suspicions." *Warner v Mitts,* 211 Mich App 557, 559; 536 NW2d 564 (1995). Negligence is not, as a matter of law, an exception to the immunity provided by statute. *Awkerman v Tri-County Orthopedic Group, P.C.,* 143 Mich App 722, 727; 373 NW2d 204 (1985).

Plaintiffs argue that the filing of the written report, as required by MCL 722.623(1); MSA 25.248(3), and subsequent decisions regarding Andrew's condition were made in bad faith because

defendants' "conduct of ignoring exonerating facts" misled DSS in its investigation. After the initial reporting, it was the duty of DSS to investigate the report, and others were then

relegated to positions of "cooperation" with the investigation. MCL 722.628(1), (8); MSA 25.248(8). This Court has specifically held that it is not the legal duty or even the option of the reporting person to investigate the possibility of abuse. *People v Cavaiani,* 172 Mich App 706, 715; 432 NW2d 409 (1988). This Court stated that even if a reporting person believes that there was no child abuse, he must still report the possibility and allow the state to investigate, because the state has different interests. *Id.*, 715. The "public policy is better served by investigating possibly unfounded reports of child abuse than by failing to investigate where abuse may prove to have occurred." *Id.*, 713.

There was no evidence presented to show that defendants ever knew that child abuse was not the cause of Andrew's injuries, and therefore lacked the required "reasonable suspicion." Even assuming that the doctors chose to accept diagnoses that seemed to support child abuse, other alternatives were discussed in the medical reports and were available for DSS to examine and question. Even if it is true that defendants did not "appreciate the true significance of the medical information before them," this would only support a case for negligence and would not be enough to overcome the statutory presumption of good faith.

Plaintiffs also argue that the trial court improperly granted summary disposition to defendants in regards to their claim of negligent infliction of emotional distress. Although it appears that the trial court determined that there was no genuine issue of material fact based on the elements of intentional infliction of emotional distress, the correct result was reached since plaintiffs also did not and cannot allege the correct elements of negligent infliction of emotional distress. *Martin v Children's Aid Society,* 215 Mich App 88, 99; 544 NW2d 651(1996).

If a party fails to state a claim upon which relief can be granted, summary disposition may be granted under MCR 2.116(C)(8). The trial court can only consider the pleadings. *Simko v Blake,* 448 Mich 648, 654; 532 NW2d 842 (1995). All factual allegations and reasonable inferences or conclusions that can be supported from the facts are presumed to be true. Id, 654. However, conclusory statements that are not supported by factual allegations are inadequate to state a cause of action. *York v 50th Dist Court,* 212 Mich App 345, 347-348; 536 NW2d 891 (1995).

This Court has determined that the elements for negligent infliction of emotional distress are: (1) the injury threatened or inflicted on the third person must be a serious one, or of a nature to cause severe mental disturbance to the plaintiff; (2) the shock must result in actual physical harm; (3) the plaintiff must be a member of the immediate family, or at least a parent, child, husband or wife; and (4) the plaintiff must actually be present at the time of the accident or at least suffer shock "fairly contemporaneous" with the accident. *Wargelin v Mercy Health Corp,* 149 Mich App 75, 81; 385 NW2d 732 (1986). In response to arguments that the tort should be expanded to include injury by publication of false statements, this Court stated, "we decline to apply the tort of negligent infliction of emotional distress beyond the situation where a plaintiff witnesses negligent injury to a third person and suffers mental disturbance as a result." *Duran v The Detroit News,* 200 Mich App 622, 629; 504 NW2d 715 (1993).

Plaintiffs argue that their claim should be allowed to go forward under the cause of action recognized in *Daley v LaCroix,* 384 Mich 4; 179 NW2d 390 (1970). In *Daley,* the Court held:

> where a definite and objective physical injury is produced as a result of emotional distress proximately caused by defendant's negligent conduct, the plaintiff in a properly pleaded and proved action may recover in damages from such physical consequences to himself notwithstanding the absence of any physical impact upon plaintiff at the time of the mental shock. [*Id.* at 12-13.]

We find *Daley* and cases following it distinguishable from the instant claim; rather than create a cause of action, they merely allow damages for emotional distress when the plaintiff has prevailed on a negligence cause of action. Although the conduct alleged here was rude, insensitive and accusatory, this Court is not prepared to recognize a wholly new tort claim.

We affirm.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Roman S. Gribbs